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# **EEO Fundamentals for Supervisors**

## **Participant Guide**

April 2011

## COURSE OVERVIEW

### ***Why a Managing for the 21<sup>st</sup> Century: EEO Fundamentals for Supervisors program?***

Learning and applying the basic foundation of Equal Employment Opportunity in the workplace can help you to recognize your ability and responsibility to ensure a more productive staff. EEO provides a framework for the supervisor to prevent issues, and resolve those that may arise. Participants will analyze hypotheticals and real-life case studies to apply EEO principles including Reasonable Accommodation, and will learn proactive measures they can take to manage more effectively.

- Identify specific roles and responsibilities of supervisors, employees, and EEO staff in maintaining a work environment that reduces the likelihood of EEO complaints.
- Identify ways that YOU can avoid/minimize the likelihood of being the subject of an EEO complaint.
- Recognize what to do (and what not to do) if you receive an EEO complaint.

### **Target Audience**

Managers and supervisors at all levels who are required to receive EEO training, and all who desire to avail themselves of tools that they can use to address EEO and Reasonable Accommodation issues in their workplace.

### **Program Timing**

This course will last 4 hours.

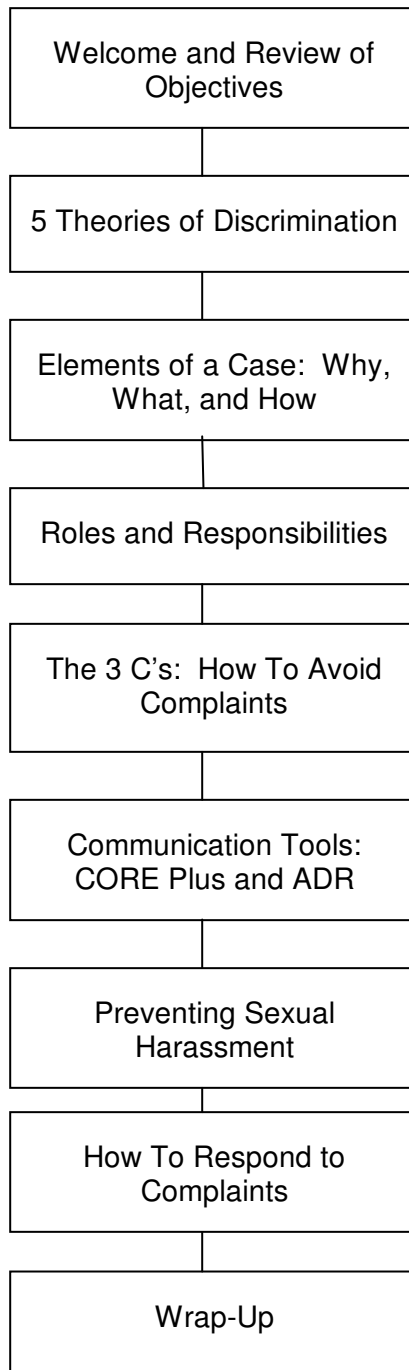
### **Learning Objectives**

At the end of this training, participants will be able to:

- Demonstrate a basic understanding of the EEO complaint process.

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# Course Map: Managing for the 21<sup>st</sup> Century



## **WRITE THIS DOWN**

- It's business, not personal!
- Legitimate, non-discriminatory management/business reasons
- Any decision can be challenged
- "Reasonable Person"

## **BASIS FOR FILING A COMPLAINT**

Alleged discrimination can be based on

- Race
- Color
- Religion
- Age
- National Origin
- Sex
- Mental or Physical Disability
- Reprisal

Added by Executive Order

- Sexual Orientation
- Parental Status
- Genetic Information

Final adjudication will be at the Secretary level only.

## ELEMENTS OF A DISCRIMINATION CASE

The three basic elements of a discrimination case are:

- Basis(es): **Why?**
- Adverse Action/Decision: **What?**
- Injury/Harm Suffered: **How?**

## ***Exercise: Is This a Case?***

Analyze these cases to determine if all 3 elements (page 5) are present.

1. Weekend Worshiper. An employee with good qualifications interviews for a visitor use assistant position. When told the duty schedule, he mentions that he attends church services on Sundays and that Sunday is a day in which he does not believe he should perform work. You do not want to be unfair to the other employees who have not expressed these concerns, so you decide not to hire him.

### **Capture your thoughts**

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## THEORIES OF DISCRIMINATION

### Disparate treatment

Disparate treatment - treating a person differently from someone outside of that person's protected class.

### Theory #1: Proof of Theory

- Three parts, burden shifting-shifting Analysis
  1. The complainant must establish a *prima facie* case of discrimination;
  2. The Agency must articulate a legitimate non-discriminatory reason for its action; and
  3. The complainant must demonstrate that the Agency's reason is a pretext (False) for prohibited discrimination.
- Burden of Production: Obligation to come forward with evidence that assertion is true.
- Burden of Persuasion: Complainant must come forward to convince the fact-finder that the assertion is true.

### *Prima Facie* case:

1. Complainant is a member of a protected class.
2. Agency took some employment action.
3. Agency treated the Complainant differently than similarly-situated employees outside of the protected class.

## **Theory #2: Disparate or Adverse Impact**

- **Disparate/Adverse Impact** Even where an employer is not motivated by discriminatory intent, Title VII prohibits the employer from using a facially neutral employment practice that has an unjustified adverse impact on members of a protected class.

## **Theory #3: Hostile Work Environment (HWE) – all elements must be present**

1. Condition of employment changed by the alleged discrimination
2. Must be severe and pervasive
3. A series of acts
  - Except on rare occasions, one incident does not equate to a hostile work environment
4. Involves harassment (sexual & non-sexual)

### **Remember:**

This theory focuses on the work environment, not personnel actions.

## **Theory #4: Failure to make Reasonable Accommodation**

1. Disability discrimination
2. Religious discrimination

## **Theory #5: Retaliation/Reprisal for Protected Activity**

- Allegations that management official took action against complainant because complainant participated in prior EEO activity
  - Prior activity includes filing a complaint, providing testimony in an EEO case, opposing discrimination
    - Employee has the burden of proof and must establish a *prima facie* case
      - They engaged in protected activity
      - Has been impacted by a decision or action
      - Causal connection between activity and action



## Let's Look at an Actual Case

***Sex Discrimination Found with Regard to Non-selection.*** Complainant, a Supervisory Staff Attorney, submitted an application to the Office of Personnel Management (OPM) for an Administrative Law Judge position. Complainant was deemed qualified for the position, was included on two certificates sent to the agency by OPM, and was interviewed by the Agency. She received a composite interview score of seven points, which the Acting Chief Administrative Law Judge indicated made her a “borderline” candidate for selection. Candidates were asked to rank their geographic preferences, and the Agency then went down the list of localities with openings and matched each vacancy with candidates that had expressed an interest in working in that area. The Agency selected the top three candidates who had expressed an interest in each locality based upon their OPM scores to compete for the position. Complainant was considered for six vacancies, but was not selected for any positions. Following a hearing, an AJ found that Complainant was subjected to sex discrimination when she was not selected for two of the positions.

On appeal, the Commission affirmed the AJ's decision. The Responsible Management Officials testified that Complainant was not selected for either position because she was not the most qualified based upon the recommendations of the interview panels. The Commission concurred with the AJ that the Selecting Officials based their decisions on “vague perceptions, intuitions, and feelings that were not premised upon the objective record.” For example, one of the Selecting Officials stated that she was concerned with Complainant's willingness to take on an assignment in a particular location and stay for the required two-year period. Complainant, however, credibly testified that she informed the interview panel in no uncertain terms that she would be willing to accept any position available and remain for at least two years. In addition, Complainant previously relocated for over three years to accept an attorney position. Further, while the Selecting Official expressed concerns about whether Complainant would be sensitive to the Agency's complainants, and be responsive to Agency management, Complainant's performance appraisals of record clearly stated that she worked well with members of the public and management officials, and had strong interpersonal skills. The Selecting Official was unable to clearly explain any basis for her concerns about Complainant beyond her own subjective impression. Finally, while the Selecting Official stated that she spoke with Agency officials who worked with Complainant, those named officials did not recall speaking with the Selecting Official about Complainant. **The Agency was ordered to place Complainant into either of the positions specified or a substantially equivalent position, with appropriate back pay and benefits, as well as pay Complainant \$30,000 in proven compensatory damages, \$95,095.80 in attorneys' fees, and \$6,288.32 in costs.** *Carter v. Soc. Sec. Admin.*, EEOC Appeal No. 0720080005 (October 23, 2009).

## EEO PROCESSES

### Informal EEO Process:

- Available for employees when they feel that they have been discriminated against.
- Employees/Applicants have 45 days from the date of the action that was taken or that they first became aware of the action.
- EEO Counselor has **30 days** (up to **90 days** for an extension or mediation) to attempt resolution.
- If no resolution, aggrieved is given a *Notice of Right to File* a formal complaint.

### Counselor Role:

- Is trained to provide guidance
- Interviews person alleging discrimination
- Conducts fact-finding, speaks with management
- Is not a representative for employees or management
- Attempts to resolve issue(s)
- Neutral role and talks to both parties

Informal EEO Process	Formal EEO Process
<ul style="list-style-type: none"><li>• Aggrieved has <b>45</b> days to contact EEO Counselor after the alleged discriminatory act.</li><li>• Witnesses (including management officials) must cooperate fully with investigator.</li></ul>	<ul style="list-style-type: none"><li>• Aggrieved must file complaint within <b>15 days</b> of receipt of Notice of Right to File a formal complaint.</li><li>• Process allows for <b>180 days</b> to investigate complaint and issue <i>Report of Investigation (ROI)</i>.</li><li>• Witnesses (including management officials) must cooperate fully with investigator.</li><li>• Aggrieved has <b>30 days</b> from receipt of ROI to request a hearing or a Final Agency Decision (FAD).</li></ul>

## **Let's Look at an Actual Case**

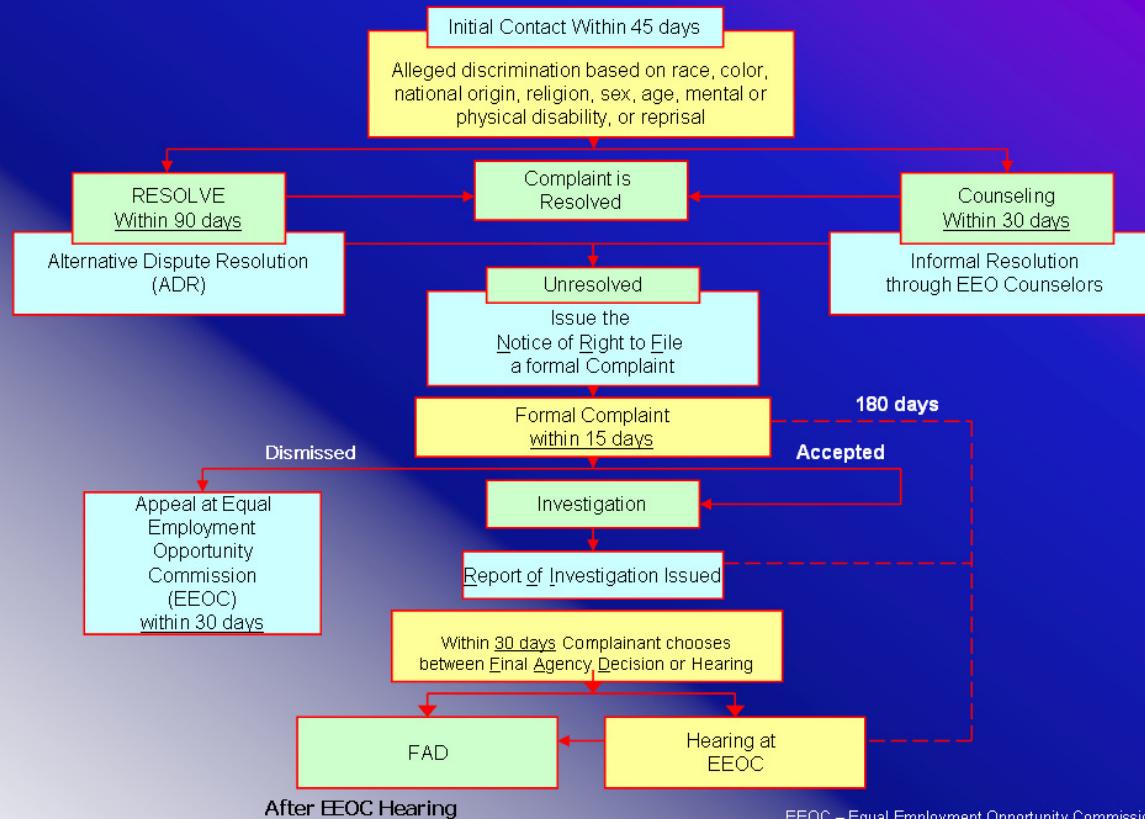
Age Discrimination Found. Complainant filed a formal complaint alleging, among other things, that she was discriminated against on the basis of her age (58) when she was not selected for a Nursing Assistant position. The agency investigated the matter, and ultimately found no discrimination. On appeal, the Commission initially determined that complainant established a prima facie case. In addition, the Commission found that the agency failed to meet its burden of showing that the action in question was based on legitimate, non-discriminatory factors. No agency selecting officials offered any specific argument or evidence regarding how the selection decision was made. The Commission stated that the agency only gave a cursory description of its decision-making process, without indicating how it applied specifically to complainant.

Thus, the Commission concluded that the agency failed to articulate a specific, clear, and individualized explanation for its actions, such that complainant was denied a fair opportunity to demonstrate pretext. The agency was ordered to offer complainant the position, or a substantially equivalent position, retroactive to the date of her non-selection, and pay complainant appropriate back pay and benefits. *Emma L. Blathers v. Department of Veterans Affairs*, EEOC Appeal No. 0120073432 (December 10, 2009), request for reconsideration denied EEOC Request No. 0520100200 (July 26, 2010).

## **What To Do if You Become the Subject of a Complaint**

- Don't panic
- Communicate with SHRO, EEO staff, and your supervisors
- Be forthcoming and helpful
- Try not to take it personally
- Keep all documents related to your employment decision

# EEO Process Flowchart



Appeal Phase – Complainant has a right to file with EEOC's Office of Federal Operations.

Judicial Phase – Complainant has a right to file a civil action in an appropriate Federal Court.

EEOC – Equal Employment Opportunity Commission

FAD – Final Agency Decision

ADR – Alternative Dispute Resolution

## Tools of the Trade: CORE Plus and Alternative Dispute Resolution (ADR)

Although CORE Plus and ADR both rely on mediation to resolve workplace disputes, there is a difference:

- CORE Plus focuses on disputes in the early stages before a redress program has been entered.
- ADR focuses on issues that are in some type of redress forum.

Reasons to Use CORE Plus/ADR:

- Alternative to using conventional avenues of redress
- Allows the use of a trained and experienced mediator to facilitate the discussion between the parties in a neutral setting
- Mediator is a neutral person who has no financial interest or personal gain in the outcome of the mediation
- Mediation allows the parties to find solutions that address the **underlying causes** of the conflict
- The parties sign an agreement that has been developed using their own words

What CORE Plus/ADR does NOT do:

- Force an employee to give up their redress process rights if an agreement is not reached
- Replace the discrimination complaint or grievance (administrative or negotiated) processes or their associated timeframes
- If an issue is not successfully resolved through the ADR process, the employee is free to continue to pursue their grievance or complaint

## Preventing Sexual Harassment

Sexual harassment is d\_\_\_\_\_ or r\_\_\_\_\_ unsolicited  
v\_\_\_\_\_ c\_\_\_\_\_, g\_\_\_\_\_, or p\_\_\_\_\_  
c\_\_\_\_\_ of a sexual nature which is u\_\_\_\_\_.

### Types of Sexual Harassment:

- Quid pro quo—a person is requested to provide sexual favors in return for some other benefit.
  - e.g., Sleep with me and I will give you a promotion
- Hostile Work Environment—the work environment is so offensive as to distract the person from being able to work.
  - e.g., lewd comments, jokes, pictures, screen savers, etc.
  -

### *Exercise: Is It Any of My Business?*

A supervisor from another division contacts you in regard to one of your employees. It appears that your employee is having an affair with the other supervisor's employee. It appears that your employee approached the second employee while they were with their spouse at a campground. No mishap occurred, but the other supervisor has asked you to talk to your employee. **Is this sexual harassment? What do you do or say?**

### Agency/Employer's Responsibility

- Generally responsible for supervisors' actions
- Take action to prevent sexual harassment
- Have anti-harassment policy

### Supervisor's Responsibility

- Must take action in response to allegations of sexual harassment
  - Appropriate, professional, and **PROMPT** response
  - Investigation
  - Put (alleged) sexual harassment offender "on notice"

## Let's Look at an Actual Case

### **1<sup>st</sup> case**

**Sexual Harassment Found.** Complainant filed a formal EEO complaint alleging, among other things, that he was subjected to sexual harassment. Specifically, Complainant stated that, on one occasion, his supervisor lifted Complainant's shirt and inappropriately touched him. On appeal, the Commission found that Complainant was subjected to unlawful sexual harassment. While the Supervisor denied that the incident occurred, Complainant's claim was supported by the statement of a co-worker eyewitness. In addition, the Agency neither rebutted nor discredited this evidence. Further, the Commission found that the supervisor's actions were sufficiently severe and pervasive to alter the conditions of Complainant's employment and create an abusive working environment. The Commission also found no basis to relieve the Agency of liability, given that Complainant reported the incident to the Agency's Postal Inspector in Charge by letter on three separate occasions, but the Agency took no action. The Agency was ordered, among other things, to pay Complainant \$10,000 in proven non-pecuniary compensatory damages, based on evidence that complainant's pre-existing stress condition had been aggravated by the Agency's actions. *Johnson v. U. S. Postal Serv.*, EEOC Appeal No. 0120073809 (June 24, 2010).

### **2<sup>nd</sup> Case**

**Sexual Harassment and Reprisal Found.** According to the record, complainant had a consensual relationship with a co-worker for approximately two years. Four years later, complainant was awarded a bid assignment that put him in the proximity of that individual. The co-worker then began to ask complainant out on dates, and, when he refused, made offensive comments to and about complainant. Complainant reported the behavior to his supervisor during the next three months, but no action was taken and the supervisor told complainant to "just give it up." Complainant asked to have his schedule changed because he was uncomfortable being around the co-worker. Complainant refused the agency's offer to move him to another building. Nevertheless, he was taken off of his bid assignment and moved despite his objections. Complainant was told that he could not come back to his former location, but the co-worker was allowed to come to the building where complainant now worked. Complainant ultimately filed a formal complaint alleging that the agency subjected him to sexual harassment. In addition, complainant alleged that management intimidated

witnesses by telling them they would not be paid if they testified at an EEO hearing, and that they would go to jail if they lied.

On appeal, the Commission affirmed the AJ's finding that complainant was discriminated against when he was sexually harassed by a co-worker, taken off of his bid assignment, not allowed in the building, and when a management official attempted to intimidate witnesses. The Commission noted that complainant reported incidents of sexual harassment to his supervisor, and the incidents had the purpose or effect of unreasonably interfering with complainant's work performance. The Commission found that the agency's characterization of the earlier reported incidents as "trivial" was a classic example of "blaming the victim." Complainant had been romantically involved with a co-worker. When she learned that he had married someone else, she began verbally harassing him on a daily basis. Complainant repeatedly complained of her behavior to management. Management ridiculed his complaints and encouraged complainant to give in to her advances. Following a loud verbal altercation on the workroom floor, an investigation was initiated. As a result of the investigation, complainant was forced to change his work location while the harasser was allowed to come and go as she pleased. The Commission found the agency completely overlooked the substantial evidence that the supervisor was aware of complainant's allegations of sexual harassment. The agency was ordered to, among other things, pay complainant \$50,000 in proven compensatory damages, compensate complainant for 20 hours of overtime he lost when he was moved to another building, and provide EEO training for the supervisors and managers involved in this case. *Andre Crawford v. United States Postal Service*, EEOC Appeal No. 0720070020 (March 5, 2010).



## **Tips for Preventing Sexual Harassment**

### **Tips for Preventing Sexual Harassment:**

- Create a harassment-free environment
  - Monitor the work environment
  - Policy awareness
  - Investigate complaints
  - Maintain confidential written record
  - Take appropriate action
  - Protect against retaliation

**Take all complaints seriously, regardless of how minor they may seem.**

## Reasonable Accommodation

### What is it?

**Reasonable Accommodation** is a logical change or adjustment to a job or worksite that makes it possible for qualified employees with disabilities to perform the essential functions of the position in question. The other two categories of reasonable accommodation: modifications or adjustments to a job application process to permit an individual with a disability to be considered for a job; and modifications or adjustments that enable employees with disabilities to enjoy equal benefits and privileges of employment.

- For an employee or applicant, the *request may be made verbally or in writing*.
  - To his/her supervisor, another supervisor or manager in his/her immediate chain of command, Superintendent, Asst Regional Director, Equal Opportunity Manager, Servicing Personnel Office, or other appropriate office
  - The interviewer from the office having the vacancy for which he/she wants to be considered
  - The Employee's/Applicant's request must state, at a minimum, that he/she needs an adjustment or change at work on the in the application process for a reason related to a medical condition.

### Reasonable Accommodation timelines:

- The supervisor/manager must review the request and issue a written decision to the Employee or Applicant within ***ten (10) business days***.
  - **Key Note:** If medical documentation is required the timeframe stops until the information is received.
  - The bureau/office also has the right to have medical information reviewed by a medical expert.
- *If the accommodation is granted the deciding official will provide the accommodation within **twenty (20) business days**.*

## Let's Look at an Actual Case

***Denial of Reasonable Accommodation Found.*** Complainant, an Immigration Status Verification Officer, filed a formal complaint alleging discrimination on the basis of his disability. Specifically, Complainant stated that, after he had a stroke, the Agency failed to act on his request to work at home as a reasonable accommodation. Complainant made his requests by telephone. During the investigation of his complaint, Complainant asserted that the Agency's actions resulted in his inability to work, and he sought disability retirement. On appeal, the Commission initially found that Complainant was a qualified individual with a disability. Complainant requested the reasonable accommodation of working at home, at least part time, while undergoing rehabilitation. One management official attempted to assist Complainant in pursuit of a reasonable accommodation, but was told that the matter was not his concern and that there was no work for Complainant. That official testified, however, that there were many tasks Complainant could have performed at home which would have aided in the mission of the Agency, and that it was possible for Complainant to access the Agency's computer databases from home. Complainant also stated that he would have been able to access the Agency's computer network from home and perform some work functions.

The Commission noted that Complainant's requests for accommodation were summarily denied by the Agency before it requested any medical documentation. The Commission found that the Agency made no attempt to determine what Complainant's limitations were or which of his essential job functions could be modified, and made no attempt to explore the possibility of other potential accommodations. Instead, the Agency encouraged Complainant to seek disability retirement. Agency officials testified that they were "either unaware or untrained" as to their responsibilities under the Rehabilitation Act. The Commission concluded that the Agency failed to make a good faith effort to reasonably accommodate Complainant. The Agency was ordered to reinstate Complainant to his position, with appropriate back pay, and pay Complainant \$200,000 in compensatory damages. *Blount v. Dep't of Homeland Sec.*, EEOC Appeal No. 0720070010 (October 21, 2009), request for reconsideration denied EEOC Request No. 0520100148 (April 16, 2010).

## Steps for Supervisors To Process a Reasonable Accommodation Request:

**Step 1:** Determine if the person requesting an accommodation is an individual with a disability.

**Step 2:** Determine whether medical documentation is required to make a determination in granting reasonable accommodation.

- Supervisor has the right to request medical documentation when a medical condition or impairment is not obvious, and s/he may ask for supplemental information.

**Step 3:** Work with your SHRO to determine if the person is able to perform the essential functions of the position.

- A “*qualified*” employee with a disability is one who is:
  - able to perform the essential functions of his/her position, or another vacant, funded position for which they are qualified, with or without accommodation; or,
  - otherwise qualified for his/her job, for another position at the same grade level, or at a lower grade level, by virtue of education, experience, physical and mental ability, and any other appropriate factors; and,
  - no potential to be a health and safety risk to him/her, or others.
- *Essential functions* of a position are those duties that are so fundamental to the position that the individual cannot do the job without being able to perform them.
- **Step 4:** Determine whether the requested/preferred accommodation is reasonable and/or imposes an undue hardship on the Bureau.
- Is there an accommodation available that will help the individual to perform the essential duties of:
  - the current position; or,
  - another vacant, funded position in which s/he could be placed, *even if at a lower grade?*
- Is this an undue hardship on the Bureau? “*Undue hardship*” means an action that requires significant difficulty.

- Overall resources of the DOI must be considered before making a determination that an accommodation presents an undue hardship.

**Step 5:** Determine whether the chosen accommodation is effective.

- If an accommodation proves ineffective for whatever reason, management should work promptly and diligently to make the changes necessary to achieve an effective accommodation.

**Step 6:** Complete the review and assessment process.

## The 3 C's: How To Avoid Being the Subject of a Complaint

- **Communication** (with your superiors as well as your employee)
- **Consistency** (your decision/action/lack of either impacts your entire staff)
- **Cooperation** (be sure not to develop a defensive posture – if you are consistent, and have sought input from EEO and other trusted advisors, and have made a good faith effort to be fair and reasonable, you should not fear cooperating with an EEO investigation)

### Remember WOW:

- It's business, not personal!
- Legitimate, non-discriminatory management/business reasons.
- Any decision can be challenged.
- Do not take any issue raised involving sexual harassment lightly. No matter how minor it is!
- Your employees are watching.

## **Questions After the Course?**

**Contact:**

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Equal Opportunity Manager  
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## Appendix A: Federal Laws That Prohibit Discrimination in the Workplace

- Title VII of the Civil Rights Act of 1964
  - Prohibits employment discrimination based on **race, color, religion, sex, or national origin**. (Title VII)
- Equal Pay Act of 1963
  - Protects men and women who perform substantially equal work in the same establishment from **sex-based wage discrimination**. (EPA)
- Age Discrimination in Employment Act of 1967 (ADEA)
  - Protects individuals who are **40 years of age or older**.
- The Rehabilitation Act of 1973
  - Prohibits discrimination against **qualified individuals with disabilities**.
- Executive Order 12106 and Executive Order 13087 (amended EO 11478)
  - Prohibits discrimination on the basis of **sexual orientation**.
- Executive Order 13152
  - Amends EO 11478 to prohibit discrimination on the basis of **status as a parent**.
- Executive Order 13145
  - Amends Title VII of the Civil Rights Act of 1964 to prohibit discrimination on the **basis of genetic information**.



## Appendix B: Links to Government EEO Resources and Information

Code of Federal Regulations (CFR) 29,  
Part 1614: Federal Sector Equal  
Employment Opportunity  
<http://www.eeoc.gov/federal/1614-final.html>

National Park Service Equal Opportunity  
Office  
<http://inside.nps.gov/waso/waso.cfm?lv=2&prg=22>

Federal Equal Employment Opportunity  
Commission (EEOC) Home Page  
<http://www.eeoc.gov>

EEOC Management Directive-110  
<http://www.eeoc.gov/federal/md110.html>

### Direct Links to EEOC “Fact” Sites:

Age Discrimination  
<http://www.eeoc.gov/facts/age.html>

Disability Discrimination  
<http://www.eeoc.gov/types/ada.html>

National Origin Discrimination  
<http://www.eeoc.gov/origin/index.html>

Race / Color Discrimination  
<http://www.eeoc.gov/facts/fs-race.html>

Religious Discrimination  
<http://www.eeoc.gov/facts/fs-relig.html>

Retaliation  
<http://www.eeoc.gov/types/retaliation.html>

Sex-based Discrimination  
<http://www.eeoc.gov/types/sex.html>

Sexual Harassment  
<http://www.eeoc.gov/facts/fs-sex.html>

### Reasonable Accommodation

Computer/Electronics Accommodation  
Program (CAP: a U.S. Dept. of Defense-  
sponsored program, to which DOI  
subscribes)  
<http://www.tricare.mil/cap/>

DisabilityInfo.gov (One-stop resource for  
individuals with disabilities)  
<http://www.disabilityinfo.gov/>

Job Accommodation Network (Ofc. of  
Disability Employment Policy, U.S. Dept of  
Labor)Office of Disability Employment  
Policy  
<http://www.jan.wvu.edu/>

Office of Personnel Management (OPM)  
<http://www.opm.gov/disability/index.asp>

### Other General Resources

Department of the Interior Office of Civil  
Rights Home Page  
<http://www.doi.gov/diversity/>

Federal Merit Systems Protection Board  
(MSPB):  
<http://www.mspb.gov/>

Office of Special Counsel  
[www.osc.gov](http://www.osc.gov)

U.S. Commission on Civil Rights  
<http://www.usccr.gov/>

U.S. Department of Labor  
<http://www.opm.gov/>

U.S. Department of Justice  
<http://www.usdoj.gov/>